93-182

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HOLABIRD SPORTS DISCOUNTERS,
Petitioner,

v.

TENNIS TUTOR, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit misapplied the standard of evidence required by *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) in ruling on summary judgment that an agreement to restrict price advertising did not constitute a contract, combination or conspiracy under Section 1 of the Sherman Act.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reprinted at Appendix ("App.") 1a-4a. The opinion of the United States District Court for the District of Maryland is reprinted at App. 5a-20a. Both are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1993. App. 1a. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Sherman Antitrust Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This is an action brought by Holabird Sports Discounters ("Holabird") against Tennis Tutor, Inc. ("TTI") under the Sherman Antitrust Act, 15 U.S.C. § 1.

TTI manufactures a unique, portable, battery-operated tennis ball practice machine known as the Tennis Tutor. App. 2a. TTI's president has testified that the Tennis Tutor is the only battery operated tennis ball machine available on the market in the United States, Greene Depo. at 35-36 (App. 22a), and that 70 or 80% of the public tennis courts do not have accessible electric power. Greene Depo. at 151 (App. 22a-23a). Therefore, there is no interbrand competition for battery operated tennis ball machines, which are the only type usable on 70 or 80% of the public tennis courts in America.

At all pertinent times, TTI imposed a policy upon its dealers which provided that TTI "will not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who . . . [a]dvertise the Tennis Tutor in any general circulation regional or national publication for less than the suggested retail price, including call for price advertisements." App. 2a.

Holabird, a mail order sporting goods distributor, was a dealer of TTI during 1989-90. App. 2a. After distributing the Tennis Tutor for more than a year, Holabird placed an advertisement for the machine in the October 1990 issue of *Tennis* magazine. App. 2a-3a. Upon learning of this, TTI terminated Holabird as a distributor for violating TTI's policy. App. 3a, 6a. TTI told Holabird it would be reinstated if it agreed in writing to abide by the policy. App. 6a. Holabird refused, and thereafter filed this action. Jurisdiction in the district court was conferred by 28 U.S.C. §§ 1331, 1332 and 1337 and 15 U.S.C. §§ 15 and 22.

Following discovery TTI moved for summary judgment on the ground (among others) that the evidence failed to establish any contract, combination or conspiracy. Holabird opposed the motion, relying on three factors as evidence of contract, combination or conspiracy.

First, on at least two occasions, TTI sought and obtained the agreement of distributors to its advertising policy. App. 11a-12a. On each of these occasions, TTI's president observed an offending advertisement in *Tennis* magazine, contacted the distributor involved and demanded that the advertisement be removed before he would supply the distributor with any Tennis Tutor ball machines. Both distributors agreed to abide by the advertising restrictions and to remove offending advertisements from future issues of *Tennis* magazine. App. 11a-12a.

Second, after TTI had terminated Holabird as a dealer for violating the policy, TTI told Holabird it would be reinstated in return for a written acknowledgment of and agreement to abide by the policy. App. 6a. Holabird offered this to show TTI's intent to "contract, combine or conspire" rather than to act unilaterally. Holabird refused to enter into such an agreement. App. 6a.

Third, after termination Holabird purchased a limited number of Tennis Tutor ball machines from so-called "diverters," *i.e.*, dealers or others who sold Tennis Tutor ball machines to Holabird. Upon learning of this, TTI told the diverters that unless they agreed to stop selling to Holabird they, too, would be terminated. In some instances, TTI, in fact, terminated them. At least one of the dealers which "diverted" the Tennis Tutor to Holabird told TTI that in the future the diverter would not sell to Holabird. App. 12a.

Notwithstanding the foregoing the district court granted TTI's motion for summary judgment on the sole ground that "Holabird has not produced sufficient evidence that TTI entered into a contract, conspiracy or combination with any other entity in its adoption of it (sic) advertising policy, or in its termination of Holabird. . . ." App. 6a. The court acknowledged that "there may be some superficial similarity between the actions deemed a conspiracy in *Monsanto* and [*United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960)] and the actions of TTI," but concluded that "Holabird has not produced evidence that 'tends to exclude the possibility' that TTI acted independently." App. 15a, 20a. The Fourth Circuit affirmed, "agreeing that, under [*Parkway Gallery Furn., Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989)], appellant failed to identify sufficient evidence tending to exclude the possibility that TTI and its dealers acted independently. . . ." App. 4a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE SUFFICIENCY OF EVIDENCE TO SHOW A CONTRACT, COMBINATION OR CONSPIRACY UNDER 15 U.S.C. § 1.

This case merits review to resolve a conflict in the lower courts as to when a manufacturer's independent action crosses the line to become concerted action amounting to a contract, combination or conspiracy under Section 1 of the Sherman Act, 15 U.S.C. § 1. The existing framework is difficult to implement as evidenced by conflicts among the courts of appeals.

The longstanding rule is that "[i]ndependent action is not proscribed." *Monsanto,* 465 U.S. at 761 (citing *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919)). A "manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply." *Monsanto,* 465 U.S. at 761. However, when a manufacturer seeks and obtains acquiescence or agreement to its resale price "policy" (or its non-price, anti-competitive "policy"), it loses its protection under *Monsanto.* 7 Phillip E. Areeda, *Antitrust Law* §§ 1446-48C at 82-104 (1986).

The standard for establishing concerted action which amounts to contract, combination or conspiracy has been stated as follows:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768. With respect to a "common scheme" this Court has explained:

> The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both *that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.*

Id. at 765 n.9 (emphasis added).

Here, the Fourth Circuit, in effect, ruled that individual discussions in which "the distributor communicated its acquiescence or agreement, and [ ] this was sought by the manufacturer" did not rise to the level of a contract, combination or conspiracy. In this regard the Fourth Circuit's ruling sharply conflicts with decisions of the Eighth and Eleventh Circuits, which hold that individual discussions between manufacturer and distributor were sufficient. The Fourth Circuit, itself, previously had recognized this conflict:

> We are aware that the Eighth Circuit has held that evidence that, following termination of a discounter after a dealer complained, a manufacturer reported to the dealer that "the problem had been taken care of," coupled with the discounter's testimony that "the only reason [a manufacturer's employee] could figure out that they were terminating me is to give [the dealer] some relief," sufficiently tended to exclude the possibility that the manufacturer and dealer were acting independently. *McCabe's Furniture v. La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005, 108 S. Ct. 1728, 100 L.Ed.2d 193 (1988). Similarly, the Eleventh Circuit has stated that evidence that, following a complaint about a discounter, a manufacturer notified the complaining dealer that "corrective action has been taken" and requested that the dealer notify it of any further problems, when coupled with the dealers' "thank you" that created an inference that the dealer agreed to notify the manufacturer, met *Monsanto's* requirements "precisely." *Helicopter*

> *Support Systems v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535-36 & n. 6 (11th Cir. 1987).
>
> In our view, however, those decisions have in effect misconstrued "tends to exclude the possibility" of independent conduct, *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1357, to mean something like "arguably consistent with the possibility of a conspiracy."

Parkway Gallery, 878 F.2d at 806 n.4. This case merits review to resolve this important conflict.

II. THE DECISION BELOW MISAPPLIES THIS COURT'S "TENDS TO EXCLUDE" REQUIREMENT IN *MONSANTO*.

As noted earlier, in awarding summary judgment against Holabird, the court held that evidence of actual agreements between TTI and distributors to abide by TTI's policy was insufficient to show contract, combination or conspiracy. In doing so the Court necessarily drew inferences against Holabird notwithstanding the rule that inferences must be drawn in favor of the party opposing a motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It also rejected as "superficial" the similarity between the evidence presented here and the evidence presented in *Monsanto*.

In *Monsanto* the evidence was that after the manufacturer had terminated an offending distributor, the manufacturer approached other price cutting distributors and said that if they did not maintain the suggested retail price, they would not receive the manufacturer's product. *Monsanto*, 465 U.S. at 765. One of the distributors balked, and the manufacturer complained to the distributor's parent company which instructed the distributor to comply. *Id.* The distributor then informed the manufacturer that it would comply. *Id.* The Court stated "[e]vidence of this kind plainly is relevant and persuasive as to a meeting of the minds. [footnote omitted]" *Id.*

Moreover, the Court held the evidence "sufficient" to establish contract, combination or conspiracy. *Id.*

The *Monsanto* evidence is analytically indistinguishable from the evidence here that TTI sought and received agreements from two of its dealers to comply with TTI's price advertising policy, sought (but did not receive) an agreement from Holabird, and sought and received agreement from other dealers not to sell the machines to Holabird. In the instant case (and in *Parkway Gallery*) the Fourth Circuit ignored that portion of the *Monsanto* opinion that the "tends to exclude" requirement means only "that the manufacturer and others had a conscious commitment to a common scheme", *Monsanto* at 768, and that "a common scheme" is evidenced when the distributor communicates its acquiescence or agreement to the manufacturer's restriction and this was sought by the manufacturer. *Id.* at 765 n.9. In effect, the Fourth Circuit requires a plaintiff to present evidence which *totally* excludes (rather than "tends to exclude") the possibility of independent action by a manufacturer and others, a requirement found nowhere in *Monsanto*.

In *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988) (Posner, J.), the court held that an agreement can be "implicit, or signified by conduct in lieu of promissory language." *Id.* at 1164. Judge Posner warned:

> [W]e do not think the Court [in *Monsanto*] intended to go so far as to rule that if a supplier telephones a dealer and tells him, '[r]aise your price by next Thursday, or I'll ship you defective goods,' and the dealer merely grunts, but complies, this is not actionable as an agreement to fix the dealer's resale price. *If it were not, there would be very little left of the rule against vertical price-fixing. . . .*

Id. (citing *Monsanto*, 465 U.S. at 761 n.7) (emphasis added). The Fourth Circuit ignored this warning.

CONCLUSION

By failing to heed Judge Posner's warning, the Fourth Circuit, in essence, has excised the prohibition against unreasonable vertical restraints from the antitrust laws.[1] Additionally, the court's reasoning conflicts with the interpretations of *Monsanto* by the Eighth and Eleventh Circuits. Lastly, the court has misapplied the *Monsanto* standard for proving contract, combination or conspiracy. Under these circumstances, the case is worthy of review, and Holabird asks that a writ of certiorari issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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[1] In *Parkway Gallery* the court ruled that the same standard for contract, combination or conspiracy applies whether the case is brought under a *per se* or rule of reason analysis. *Parkway Gallery*, 878 F.2d at 805. Thus, *Parkway Gallery's* holding affects all vertical restraint cases.